DEPARTMENT OF COMMERCIAL LAW.

EDITOR-IN-CHIEF,
FRANK P. PRICHARD, ESQ.,
Assisted by
H. GORDON MCCOUCH, CHARLES C. BINNEY,
CHARLES C. TOWNSEND, FRANCIS H. BOHLEN,
OLIVER BOYCE JUDSON.

FISHER *v.* FISHER.[1] APPELLATE COURT OF INDIANA.

Dealing in Futures—Delivery—Validity of Contract—Evidence.

When there is evidence that the defendant and his cousin bought a quantity of wheat through reputable members of the Chicago Board of Trade, which was delivered to them in the form of warehouse receipts; that actual delivery on demand was intended by all parties, and that they could have got the wheat on demand; that they carried it a while on margin with said dealers; that wheat depreciated, and they closed out at a loss, which was all paid by the cousin, defendant giving him the note in suit in settlement of his share—in view of these facts a finding that the note was not founded on a gambling consideration will not be reversed.

FUTURES.

No gambling device has ever afforded the votaries of fortune such opportunities or such incentives as the invention of "future" contracts; and at no time in the history of the world has gambling been carried to such ruinous excess. The tales of old-world extravagance and of ante-bellum recklessness fade into obscurity beside the millions that are staked on a single deal in wheat or corn; and no mania for cards could ever have wrought the widespread loss and suffering due to the cold-blooded manipulations of a Gould or of a Fisk. But the effects of such dealings belong to the domain of economic science; the law is only concerned with their validity.

The forms of these contracts are as numerous as the condi-

[1] Reported in 36 N. E. Rep. 296.

tions of human affairs; and their variety is bewildering to any one not to the manner born—or at least bred. Starting with a simple "option" (to buy or to sell) we are soon introduced into a labyrinth of "puts" and "calls," sales "short" and "long," and the like, until we reach the highest development of the stock gambler's inventive genius in the famous "straddle," that marvelous machine designed to rescue the unhappy operator from being impaled on either horn of a dilemma, though having a peculiar tendency to transfix him with both. But whatever the name, and whatever the outward form, a "future" contract means substantially a contract to buy or to sell, or to deliver or to receive commodities at some future time.

I. A contract to buy or to sell goods, the execution of which is postponed to some future time, is not necessarily invalid, even though the goods are not in the possession of the vendor, nor has he contracted to procure them from another, nor has any reasonable expectation of becoming possessed of them by the time appointed, otherwise than by purchasing them after the contract is made: Hibblewhite *v.* McMorine, 5 M. & W. 462; Ashton *v.* Dakin, 4 H. & N. 867; Bartlett *v.* Smith, 13 Fed. Rep. 263; White *v.* Barber, 123 U. S. 392; S. C., 8 Sup. Ct. Rep. 221; Bibb *v.* Allen, 149 U. S. 481; S. C., 13 Sup. Ct. Rep. 950; Wolcott *v.* Heath, 78 Ill. 433; Pixley *v.* Boynton, 79 Ill. 351; Logan *v.* Brown, 81 Ill. 415; Cole *v.* Milmine, 88 Ill. 349; Appleman *v.* Fisher, 34 Md. 540; Williams *v.* Tiedemann, 6 Mo. App. 269; Cassard *v.* Hinman, 1 Bosw. (N. Y.) 207; Tyler *v.* Barrows, 6 Robt. (N. Y.) 104; Kingsbury *v.* Kirwin, 43 N. Y. Super. Ct. 451; Kahn *v.* Walton, 46 Ohio St. 195; S. C., 20 N. E. Rep. 203; Brua's App., 55 Pa. 294; Smith *v.* Bouvier, 70 Pa. 325. Nor is a future sale, with the privilege reserved on either side to execute the contract or not, necessarily an illegal contract. "The vendee of goods may expect to produce or acquire them in time for a future delivery, and while wishing to make a market for them, is unwilling to enter into an absolute obligation to deliver, and therefore bargains for an option which, while it relieves him from liability, assures

him of a sale, in case he is able to deliver, and the purchaser may in the same way guard himself against loss beyond the consideration paid for the option, in case of his inability to take the goods. There is no inherent vice in such a contract:" Bigelow *v.* Benedict, 70 N. Y. 202; S. C., 26 Am. Rep. 573; Brown *v.* Hall, 5 Lans. (N. Y.) 177; Perryman *v.* Wolffe, 93 Ala. 290; S. C., 9 So. Rep. 148; Kirkpatrick *v.* Bonsall, 72 Pa. 155; Maxton *v.* Gheen, 75 Pa. 166. It makes no difference that the transaction is a speculative one: Stewart *v.* Parnell, 147 Pa., 523; S. C., 29 W. N. C. 537; 23 Atl. Rep. 838. If the intention of the parties is to execute the contract, in case the option is exercised, by an actual delivery and receipt of the subject matter, the contract is valid: Sondheim *v.* Gilbert, 117 Ind. 71; Rumsey *v.* Berry, 65 Me. 570; Farnum *v.* Pitcher, 151 Mass. 470; S. C., 24 N. E. Rep. 590; Jones *v.* Shale, 34 Mo. App. 302; Noyes *v.* Spaulding, 27 Vt. 420. The delivery need not be manual; it may be symbolical, by means of warehouse receipts, bills of lading, or the like: Fisher *v.* Fisher (Ind.), the principal case, 36 N. E. Rep. 296; Farnum *v.* Pitcher, *supra;* Gregory *v.* Wendell, 39 Mich. 337.

II. If, however, there is no actual delivery intended, but the transaction is to be settled by the payment of the difference between the market price and that fixed by the contract, this amounts in legal effect to a mere wager on the price of the goods, and the contract is accordingly held void, at common law, as well as by statute in many States. "Such contracts are against public policy, because they tend to unsettle the natural course of trade, and tempt the parties to them to work for a rise or fall in the prices of the commodities on which their wagers are laid, without regard to actual values, and by methods calculated to promote their own profit at the expense or ruin of others, without reciprocity of benefit. And, besides these evils, there are others, more immediate to the parties, culminating from time to time in loss of fortune and character, defalcations, crime and domestic misery, evils which, though they do not always follow, yet follow so often that they have not been overlooked by the courts:" Flagg *v.* Gilpin, 17 R. I. 10; S. C., 19 Atl. Rep. 1084; Grizewood *v.* Blane, 11 C. B. 525;

Barry *v.* Croskey, 2 J. & S. 1; Bartlett *v.* Smith, 13 Fed. Rep. 263; Embrey *v.* Jamison, 131 U. S. 336; S. C., 9 Sup. Ct. Rep. 776; Cobb *v.* Prell, 16 Cent. L. J. 453; Justh *v.* Holliday, 17 Cent. L. J. 56; Lee *v.* Boyd, 86 Ala. 283; S. C., 5 So. Rep. 489; Pickering *v.* Cease, 79 Ill. 328; Cothran *v.* Ellis, 125 Ill. 496; S. C., 16 N. E. Rep. 646; Watte *v.* Costello, 40 Ill. App. 30; Beadles *v.* McElrath, 85 Ky. 230; Rumsey *v.* Berry, 65 Me. 575; Gregory *v.* Wendell, 39 Mich. 337; Waterman *v.* Buckland, 1 Mo. App. 45; Cockrell *v.* Thompson, 85 Mo. 510; Rudolf *v.* Winters, 7 Neb. 125; Yerkes *v.* Salomon, 11 Hun. (N. Y.) 471; Peck *v.* Doran, 46 Hun. (N. Y.) 454; Story *v.* Salomon, 71 N. Y. 420; Williams *v.* Carr, 80 N. C. 294; Lester *v.* Buel (Ohio), 30 N. E. Rep. 821; Brua's App., 55 Pa. 294; North *v.* Phillips, 89 Pa. 250; Oliphant *v.* Markham, 79 Tex. 543; S. C., 15 S. W. Rep. 569; Everingham *v.* Meighan, 55 Wis. 354; S. C., 13 N. W. Rep. 269; Lowry *v.* Dillman, 59 Wis. 197.

A future contract is not illegal, however, merely because it is in fact settled by the payment of differences. It is the original intent of the parties that governs; and if that be for a *bona fide* execution of the contract by delivery, even though contemplating the possibility of a settlement by way of adjusting differences, the contract is valid in its inception, and either party may waive his right to actual execution, and make a settlement on the basis of differences in price, which will not render the contract void: Clarke *v.* Foss, 7 Biss. C. Ct. 540; Boyd *v.* Hanson, 41 Fed. Rep. 174; Univ. Stock Exch. *v.* Stevens, 66 L. T. N. S. 612. The existence of the illegal intent is not necessarily to be inferred from the final settlement [though it would seem to be a strong indication of it]: Ware *v.* Jordan, 25 Ill. App. 534; see Porter *v.* Viets, 1 Biss. C. Ct. 177.

Similarly, the fact that the transaction was carried on through a broker, by means of margins furnished him to secure him against any loss which he might suffer on his principal's account, is not an infallible sign of a wagering contract. The intent to deliver may exist in such a case, and the margin may be demanded only as an earnest to secure the delivery of

the goods, or the payment of the purchase price: Preston *v.* R. R., 36 Fed. Rep. 54; Union Nat'l Bk. *v.* Car, 16 Cent. L. J. 320; Fisher *v.* Fisher, 113 Ind. 474; S. C., 15 N. E. Rep. 832.

III. In order to invalidate a future contract, the illegal intent must be mutual: Connor *v.* Heman, 44 Mo. App. 346. If either party intends a *bona fide* execution, the contract is good as to him, and will be enforced at his suit. The secret intention of the other party cannot affect his rights: Clarke *v.* Foss, 7 Biss. C. Ct. 540; Bartlett *v.* Smith, 13 Fed. Rep. 263; Bangs *v.* Hornick, 30 Fed. Rep. 97; Lehman *v.* Feld, 37 Fed. Rep. 852; Edwards *v.* Hoeffinghoff, 38 Fed. Rep. 635; Boyd *v.* Hanson, 41 Fed. Rep. 174; Pixley *v.* Boynton, 79 Ill. 351; Carroll *v.* Holmes, 24 Ill. App. 453; Benson *v.* Morgan, 26 Ill. App. 22; Wheeler *v.* McDermid, 36 Ill. App. 179; Whitesides *v.* Hunt, 97 Ind. 191; Murry *v.* Ocheltree, 59 Iowa, 435; S. C., 13 N. W. Rep. 411; Gregory *v.* Wendell, 39 Mich. 337; Williams *v.* Tiedeman, 6 Mo. App. 269; Cockrell *v.* Thompson, 85 Mo. 510; Hentz *v.* Miner, 64 Hun. (N. Y.) 636; S. C., 18 N. Y. Suppl. 880; Williams *v.* Carr, 80 N. C. 294; Wall *v.* Schneider, 59 Wis. 352; Ashton *v.* Dakin, 4 H. & N. 867.

IV. In consequence of the manner in which these transactions are now carried on through the medium of Exchanges and Boards of Trade, it very rarely happens that a future contract is made directly between the parties. It is usually effected through the medium of a broker employed for that purpose; and this introduces a new element for consideration, viz.: whether the broker, thus employed, is to be viewed as a mere agent, unaffected by the illegal intent of the parties, or whether he is so far affected by that intent as to be precluded from recovering advances and commissions on account of such contract.

The rule in England, as laid down in Thacker *v.* Hardy, 4 Q. B. D. 685; S. C., 27 W. R. 158, seems to be, that the broker, even with knowledge of the customer's illegal intent, is merely the agent of the latter; and that as there is no agreement between him and the customer to buy or sell, there is no illegality in his employment, and he can recover advances and

commissions: Rosewarne *v.* Billing, 15 C. B. N. S. 316; see, however, Cooper *v.* Neil, U. N., 1878, p. 128. But in America the far more reasonable rule is adopted that "when the broker is privy to the unlawful design of the parties, and brings them together for the very purpose of entering into an illegal agreement, he is *particeps criminis*, and cannot recover for services rendered or losses incurred by himself on behalf of either in forwarding the transaction:" Irwin *v.* Williar, 110 U. S. 499; S. C., 4 Sup. Ct. Rep. 160; Embrey *v.* Jamison, 131 U. S. 336; S. C., 9 Sup. Ct. Rep. 776; Re Green, 7 Biss. C. Ct. 338; Phelps *v.* Holderness, 56 Ark. 300; S. C., 19 S. W. Rep. 921; Walters *v.* Comer (Ga.), 5 S. E. Rep. 292; Bk. *v.* Cunningham, 75 Ga. 366; Cothran *v.* Ellis, 125 Ill. 496; S. C., 16 N. E. Rep. 646; Wheeler *v.* McDermid, 36 Ill. App. 179; Stewart *v.* Schall, 65 Md. 289; Harvey *v.* Merrill, 150 Mass. 1; S. C., 22 N. E. Rep. 49; Hill *v.* Johnson, 38 Mo. App. 383; Crawford *v.* Spencer, 92 Mo. 498; Kahn *v.* Walton, 46 Ohio St. 195; S. C., 20 N. E. Rep. 203; Lester *v.* Buel (Ohio), 30 N. E. Rep. 821; Fareira *v.* Gabell, 89 Pa. 89; Dickson *v.* Thomas, 97 Pa. 278. One who deals with a broker deals with him as a principal, not as an agent: Ruchizky *v.* De Haven, 97 Pa. 202. It does not matter that some of the parties with whom the broker dealt were actual buyers and sellers. The illegal intent pervades the whole course of dealing: Fareira *v.* Gabell, 89 Pa. 89; Miles *v.* Andrews, 40 Ill. App. 155. The question is purely between the broker and the customer, and his dealings with third parties are immaterial on the question of the understanding between them: Griswold *v.* Gregg, 24 Ill. App. 384; Kennedy *v.* Stout, 26 Ill. App. 133; Miles *v.* Andrews, 40 Ill. App. 155.

Two cases only appear to favor the English rule: Taylor *v.* Penquite, 35 Mo. App. 389, which rests on a mistake as to the decision in Cockrell *v.* Thompson, 85 Mo. 510; and Barnes *v.* Smith (Mass.), 34 N. E. Rep. 403, which seems to cling to the idea that the broker is the agent only of the customer; but these are of no weight against the preponderance of authority cited.

If, however, the broker is ignorant of the illegal design of

his customer, and acts in good faith, the contract is good as to him, and he can recover his advances, commissions and losses: Rountree *v.* Smith, 15 Repr. 609; Irwin *v.* Williar, 110 U. S. 499; S. C., 4 Sup. Ct. Rep. 160; Lehman *v.* Feld, 37 Fed. Rep. 852; Edwards *v.* Hoeffinghoff, 38 Fed. Rep. 635; Boyd *v.* Hanson, 41 Fed. Rep. 174; Murry *v.* Ocheltree, 59 Iowa, 435; S. C., 13 N. W. Rep. 411; Williams *v.* Carr, 80 N. C. 294; Potts *v.* Dunlap, 110 Pa. 177; S. C., 20 Atl. Rep. 413.

V. As the intent of the parties is the criterion of the nature of the contract, anything which goes to show that intent is admissible as evidence in a suit founded on the contract: Yerkes *v.* Salomon, 11 Hun. (N. Y.) 471; Cassard *v.* Hinman, 6 Bosw. (N. Y.) 14; Hentz *v.* Miner, 58 Hun. 428; S. C., 12 N. Y. Suppl. 474. All the circumstances surrounding the transaction, and the conduct of the parties with reference to it, are legitimate evidence on this question: Boyd *v.* Hanson, 41 Fed. Rep. 174; Hill *v.* Johnson, 38 Mo. App. 383. The general course of dealing between the parties is some evidence, though not conclusive, of the nature of the transaction in question: Watte *v.* Costello, 40 Ill. App. 307; Lowe *v.* Young, 59 Iowa, 364; S. C., 13 N. W. Rep. 329; Kenyon *v.* Luther, 4 N. Y. Suppl. 498; S. C. aff., 10 N. Y. Suppl. 951. And so is the general course of dealing of the Board or Exchange, of which the broker is a member: Beveridge *v.* Hewitt, 8 Ill. App. 467. But it is not allowable to give in evidence special instances of illegal transactions, either with the party to the contract, or with third persons: Gruner *v.* Stucken (La.), 3 So. 338; Dwight *v.* Badgley, 60 Hun. (N. Y.) 144; S. C., 14 N. Y. Suppl. 498; Potts *v.* Dunlap, 110 Pa. 177; S. C., 20 Atl. Rep. 1413. Even the subsequent acts of the parties may be evidence of their original intent: Clarke *v.* Foss, 7 Biss. C. Ct. 540.

The rules of the Board or Exchange on whose floor the dealings are carried on are admissible on the construction of the contract: Bartlett *v.* Smith, 13 Fed. Rep. 263; Bibb *v.* Allen, 149 U. S. 481; S. C., 13 Sup. Ct. Rep. 950. When the rules provide that if further margins are not put up on notice, the

contract may be treated as filled, and the other party may recover the difference between the contract and market price, without any performance or offer to perform on his part, they will make a contract good on its face illegal and void: Lyon *v.* Culbertson, 83 Ill. 33; S. C., 25 Am. Rep. 349. But if the illegal intent be otherwise proven, the rules cannot be invoked to show that, according to them, actual delivery must be made: Mackey *v.* Rausch, 60 Hun. (N. Y.) 583; S. C., 15 N. Y. Suppl. 4.

The ability of the parties to perform their contracts is a very material circumstance; for if their means are wholly disproportioned to the value of the goods purchased, the inference is strong that the transaction is not *bona fide:* Beveridge *v.* Hewitt, 8 Ill. App. 467; Curtis *v.* Wright, 40 Ill. App. 491; Myers *v.* Tobias (Pa.), 16 Atl. Rep. 641; S. C., 24 W. N. C. 432; Gaw *v.* Bennett, 153 Pa. 247; S. C., 31 W. N. C. 557; 25 Atl. Rep. 1114; Watte *v.* Wickersham, 27 Neb. 457; S. C., 43 N. W. Rep. 259. It has also been held that when the sum deposited with the broker bears no proper proportion to the value of the stock ordered, the inference is that a gambling contract was intended; but this is hardly consonant with the weight of authority: Patterson's App. (Pa.), 13 W. N. C. 154.

When the evidence showed that the brokers were willing to buy or sell for the customer at their own risk without inquiry as to his financial ability, so long as he put up the necessary "margins;" that when he failed to advance further funds, the brokers, without offering to deliver or demanding the price of the cotton, promptly closed out the contract and demanded the difference between the contract and market price, the facts show a gambling contract: Phelps *v.* Holderness, 56 Ark. 300; S. C., 19 S. W. Rep. 921. So, evidence that the customer was not a refiner of oil, or one who would buy for his own consumption; that he had not sold the oil when he exercised his option; that he did not intend to exercise it if the market price fell below that fixed in the agreement, joined to proof that he was financially unable to take and pay for the whole amount of oil he had contracted for, leads to the conviction

that the contract was a gambling one: Kirkpatrick *v.* Bonsall, 72 Pa. 155. But when the customer pays a part of the purchase price, leaves stock with the broker till paid for, and directs him to sell it again, the contract is valid: Eggleston *v.* Rumble, 66 Hun. (N. Y.) 627; S. C., 20 N. Y. Suppl. 819. And when the wheat purchased is delivered in the form of warehouse receipts, which would entitle the purchasers to actual delivery of it on presentation thereof, the transaction is good: Fisher *v.* Fisher, the principal case (Ind.), 36 N. E. Rep. 296.

Ordinarily, the burden of proof lies on the party asserting the illegality of a contract good on its face: Benson *v.* Morgan, 26 Ill. App. 22; Mohr *v.* Miesen, 47 Minn. 228; S. C., 49 N. W. Rep. 862; Harris *v.* Tumbridge, 83 N. Y. 92. But though an illegal intent will not be presumed: Story *v.* Salomon, 71 N. Y. 420; yet experience has so proved the likelihood of illegal intent in future contracts, that the tendency seems now to be to put the burden of proof on the one who seeks to enforce the contract, at least when a doubt has been cast upon it by the testimony of the opposite party: Wheeler *v.* McDermid, 36 Ill. App. 179; First Nat'l Bk. *v.* Oskaloosa Co., 66 Iowa, 41; S. C., 23 N. W. Rep. 255; Sprague *v.* Warren, 26 Neb. 326; S. C., 41 N. W. Rep. 1113; Cobb *v.* Prell, 16 Cent. L. J. 453; Barnard *v.* Backhaus, 52 Wis. 593.

VI. In Illinois, the statute against dealing in fntures is peculiarly strict. "Whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain or other commodity, stock of any railroad or other company, or gold . . . . shall be fined . . . . and all contracts made in violation of this section shall be considered gambling contracts, and shall be void:" Cr. Code Ill., § 130. It is the rule under this statute that any future contract, other than an actual sale, is void: Webster *v.* Sturges, 7 Ill. App. 560; Locke *v.* Fowler, 41 Ill. App. 66; Schneider *v.* Turner, 130 Ill. 28; S. C., 22 N. E. Rep. 497; Aff. S. C., 27 Ill. App. 220; Pearce *v.* Foote, 113 Ill. 228; Corcoran *v.* Coal Co., 138 Ill. 390; S. C., 28 N. E. Rep. 759; but see Richter *v.* Frank, 41 Fed. Rep. 859. The same seems to be the rule in Iowa: Osgood

v. Bauder, 82 Iowa, 171; S. C., 47 N. W. 1001. This, however, applies to optional sales only. If the sale be absolute, and the delivery only is future, the contract is still valid: White *v.* Barber, 123 U. S. 392; S. C., 8 Sup. Ct. Rep. 221; Wolcott *v.* Heath, 78 Ill. 433; Logan *v.* Brown, 81 Ill. 415.

VII. When the contract is illegal, and cannot be enforced, a security founded on that contract is void in the hands of the principal, of the broker, if *particeps criminis*, or of a purchaser with notice: Steers *v.* Lashley, 6 T. R. 61; Re Green, 7 Biss. C. Ct. 338; Embrey *v.* Jemison, 131 U. S. 336; S. C., 9 Sup. Ct. Rep. 776; Brown *v.* Alexander, 29 Ill. App. 626; Cothran *v.* Ellis, 125 Ill. 496; S. C., 16 N. E. Rep. 646; Davis *v.* Davis, 119 Ind. 511; S. C., 21 N. E. Rep. 1112; Swartz's App., 3 Brewst. (Pa.) 131; Griffith's App., 16 W. N. C. (Pa.) 249; Dempsey *v.* Harm (Pa.), 12 Atl. Rep. 27; S. C., 9 Cent. Rep. 615; Brua's App., 55 Pa. 294; Fareira *v.* Gabell, 89 Pa. 89; Griffiths *v.* Sears, 112 Pa. 523; Oliphant *v.* Markham, 79 Tex. 543; S. C., 15 S. W. Rep. 569; Barnard *v.* Backhaus, 52 Wis. 593. If the broker be innocent he can recover, and so can a *bona fide* holder: Lehman *v.* Strasberger, 2 Woods C. Ct. 554; Pearce *v.* Rice, 142 U. S. 28; S. C., 12 Sup. Ct. Rep. 130; Sondheim *v.* Gilbert, 117 Ind. 71; Crawford *v.* Spencer, 92 Mo. 498. But when the making of such a contract is declared a crime by statute, a security founded thereon is void, even in the hands of a *bona fide* holder: Hawley *v.* Bibb, 69 Ala. 52; Cunningham *v.* Bank, 17 Cent. L. J. 470; Bank *v.* Cunningham, 75 Ga. 366; Snoddy *v.* Bank, 88 Tenn. 573; Bank *v.* Carroll, 80 Iowa, 11; S. C., 45 N. W. Rep. 304.

VIII. One who is a party to such an illegal contract cannot, either at common law or in equity, recover money paid in furtherance of the transaction. As we have seen the broker cannot recover his advances on behalf of his principal, nor can the principal recover the money deposited with the broker as margins: Lawton *v.* Blitch, 83 Ga. 663; S. C., 10 S. E. Rep. 353; O'Brien *v.* Luques, 81 Me. 46; S. C., 16 Atl. Rep. 304; Burt *v.* Myer, 71 Md. 467; Gregory *v.* Clark, 39 Mich. 337; Ruchizky *v.* De Haven, 97 Pa. 202; Stewart

v. Parnell, 147 Pa. 523; S. C., 29 W. N. C. 537; 23 Atl. Rep. 838; Sowles *v.* Bank, 61 Vt. 375; S. C., 17 Atl. Rep. 791. There are occasional exceptions to this rule. Thus the customer can recover if he intended a *bona fide* sale and delivery: Gregory *v.* Clark, 39 Mich. 337. A minor can recover money so paid by him during minority: Ruchizky *v.* De Haven, 97 Pa. 202. When the broker acknowledges a balance in his hands in favor of the customer, the latter may recover, if he can show that the broker received the money for his use: Peters *v.* Grim (Pa.), 30 W. N. C. 177; S. C., 24 Atl. Rep. 192; Repplier *v.* Jacobs, 30 W. N. C. 180; S. C., 24 Atl. Rep. 194; Floyd *v.* Patterson, 72 Tex. 202; S. C., 10 S. W. Rep. 526. So a deposit of margins can be recovered if the customer revoke his illegal instructions: Dancy *v.* Phelan, 82 Ga. 243; S. C., 10 S. E. Rep. 205. Or if his complaint does not on its face show an illegal contract: Clarke *v.* Brown, 77 Ga. 606.

By statute, however, such payments are made recoverable in many of the States of the Union. The question depends on the wording of the particular statute; but in general either party may recover of the other: Cushman *v.* Root, 89 Cal. 373; S. C., 26 Pac. Rep. 883; Kennedy *v.* Stout, 26 Ill. App. 133; N. Y. & Chic. Grain & Stock Exch. *v.* Mellen, 27 Ill. App. 556; Lyons *v.* Hodges (Ky.), 13 S. W. Rep. 1076; Peck *v.* Doran, 46 Hun. (N. Y.) 454; Copley *v.* Doran, 1 N. Y. Suppl. 888; Lester *v.* Buel (Ohio), 30 N. E. Rep. 821. Though it has been held that the broker cannot recover in Illinois: White *v.* Barber, 123 U. S. 392; S. C., 8 Sup. Ct. Rep. 221.

One who knowingly lends money for the purpose of furthering a gambling transaction in futures cannot recover it: Waugh *v.* Beck, 114 Pa. 422; Plank *v.* Jackson, 128 Ind. 424; S. C., 26 N. E. Rep. 568, but if he take no part in the transaction mere knowledge on his part that the money was to be so used, will not preclude him from recovery: Armstrong *v.* Bank, 133 U. S. 433; S. C., 10 Sup. Ct. Rep. 450; Jackson *v.* Bank, 125 Ind. 347; S. C., 25 N. E. Rep. 430. The true test is whether or not he requires the aid of the

illegal transaction to make out his case; if so, he cannot recover; if not, he can: Armstrong *v.* Bank, *supra.*

IX. In all cases of alleged gambling contracts in futures, the question as to their nature is one of fact, not of law; for the jury, not for the court: Washer *v.* Bond, 40 Kans. 84; S. C., 19 Pac. Rep. 323; Fareira *v.* Gabell, 89 Pa. 89; Thompson *v.* Reiber, 123 Pa. 457; S. C., 23 W. N. C. 180; 16 Atl. Rep. 793.

X. There is one very curious kind of future contract that has frequently come before the courts during the past few years. This is what is known as a "Bohemian Oats" contract. By it a quantity of oats, professedly of a special brand, but in reality of ordinary kind, is sold to a farmer at a price far above its real value, and a bond is given by the seller to buy back a certain number of bushels of the crop at a high figure, promising a profit to the unwary agriculturist. With but one exception, Watson *v.* Blossom, 2 N. Y. Suppl. 551; S. C. Aff., 4 N. Y. Suppl. 489, these contracts have been held illegal as against public policy, and notes given on them void, except in the hands of a *bona fide* holder, subject to the exception in the latter case due to the operation of criminal statutes, as explained in Schmueckle *v.* Waters, 125 Ind. 265; S. C., 25 N. E. Rep. 281; Glass *v.* Murphy (Ind. App.), 30 N. E. Rep. 1097; Kain *v.* Bare (Ind. App.), 31 N. E. Rep. 205; Merrill *v.* Packer, 80 Iowa, 542; S. C., 45 N. W. Rep. 1076; Shipley *v.* Reasoner, 80 Iowa, 548; S. C., 45 N. W. Rep. 1077; Sutton *v.* Beckwith, 68 Mich. 303; S. C., 36 N. W. Rep. 79; Mace *v.* Kennedy, 68 Mich. 389; S. C., 36 N. W. Rep. 187; McNamara *v.* Gargett, 68 Mich. 454; S. C., 36 N. W. Rep. 218. The first Iowa case on this subject, Hanks *v.* Brown, 79 Iowa, 560; S. C., 44 N. W. Rep. 811, decided that such a contract was not obnoxious to the statute of that State against gambling contracts, strangely enough forgetting all about the common law and public policy; but this omission has been corrected by the later cases from that State cited above.

XI. A contract to "corner" the market by buying up stock or goods is illegal at common law as against public

policy: Samuel *v.* Oliver (Ill.), 22 N. E. Rep. 499; Sampson *v.* Shaw, 101 Mass. 145.

An agreement by which one guarantees to another that cattle to be sold by the latter shall bring so much a head, binding himself to pay the difference if they bring less, while the owner agrees to pay the difference to the guarantor in case they bring more, is a wager on the price of the cattle, and a note given for such difference is void: Bank *v.* Carroll, 89 Iowa, 11; S. C., 45 N. W. Rep. 304.

R. D. S.

DEPARTMENT OF TORTS.

EDITOR-IN-CHIEF,
MELVILLE M. BIGELOW, ESQ.,
Assisted by
BENJAMIN H. LOWRY, ALEXANDER DURBIN LAUER.
PATRICK C. B. O'DONOVAN.

DICKSON *v.* WALDRON.[1] SUPREME COURT OF INDIANA.

The manager of a theatre is responsible for the acts of a special police who was appointed for the theatre, at the special request of the manager, by the Board of Metropolitan Police Commissioners, and who was employed and paid solely by such manager: 34 N. E. Rep. 506, affirmed.

The manager is liable for an assault and battery on an offensive patron by the special police, when acting as doorkeeper, since such act was within the scope of his employment in his master's business: 34 N. E. Rep. 506, affirmed.

LIABILITY OF A THEATRE MANAGER FOR ASSAULT COMMITTED BY A SPECIAL POLICEMAN.

The liability of a master for an assault and battery committed by his servant is based on the common law principle "*Qui facit per aluim facit per se*," the theory being that the master in selecting his servants must do so with prudence and caution, and must select persons capable of fulfilling the duties

[1] Reported in 35 N. E. Rep. 1, Nov. 24, 1893.